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ABSTRACT

The paper provides information concerning legal issues relating to sex bias which may be inherent in the present popular usage of standardized interest measurement instruments, focusing on current laws and guidelines, and the possible implications of judicial decisions which relate to sex bias and interest testing in education and employment settings. No test case has included or noted interest measurement instruments; employing the method of "doctrine of analogy," however, inferences regarding the legal issues have been drawn. To the extent that interest inventories support stereotypic sex and occupational linkages or restrictions, the tests are biased; should a sex-biased instrument discourage an applicant from educational or employment opportunity, or be used in a negative decision in the case of the applicant because of differentiating scales or inappropriate sex-based normative data, then it would appear that the spirit of the law was denied. Two remedies seem clearly indicated: (1) revision, with greater specificity regarding the use of interest tests and the applicant's stake in the decision-making process, of extant guidelines supporting law, and greater specificity within guidelines to be developed to support Title IX of the Education Amendments; (2) the development of future laws should definitively state the dimensions of concern. (Author/AJ)

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LEGAL ISSUES: STATUS REPORT

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LEGAL ISSUES: STATUS REPORT

"Legal issues and concerns relating to sex bias inherent in standardized interest measurement instruments used in education and employment."

The purpose of this paper is to provide information concerning legal issues relating to sex bias which may be inherent in the present popular usage of standardized interest measurement instruments. The focus is upon current laws and Guidelines, and the possible implications of judicial decisions which relate to sex bias and interest testing in education and employment settings.

At the outset it must be noted that there are no recorded judicial decisions which directly challenge or affirm the use of interest testing in educational institutions or by employers. However, legal precedent has been established in the case of intelligence testing. It would seem to be merely a matter of time before the use of interest tests will become a matter of judicial record, following patterns of related issues, and the resultant legal action.

The Process of Law

Legislative acts and laws are important tools in the process of law. However, law is much more dynamic than a set of rules and regulations. Law should be studied as a social institution.

> Law is an institution in the sense of an integrated pattern or process of social behaviors and ideas. What goes on inside courts, legislatures, law offices, and other places in which law-making, law-enforcing, law-administering, and law-interpreting is carried on, together with what goes on inside the minds of people thinking with reference to what goes on in these places, forms a law way of acting and thinking, which overlaps but is not identical with economic, religious, political and other social ways of acting and thinking. (Berman and Greiner, 1972, pp. 6-7)

Law embodies the moral and economic principles of the society, reflects the political authorities who shape it and it also represents the historical

continuity and consistency of doctrine. The Constitution and state and Federal laws help define the parameters of acceptable conduct, and enable people to calculate the consequences of their conduct. The broad and general nature of the Constitution and the various laws present the problem of interpretation of meaning and intent. The judicial decision of each court case adds to the body of knowledge that defines what the law is. Judicial opinions also interpret the congressional intent of the law.

Legal reasoning involves viewing a particular situation in the light of past legal decisions. One must ask: Has there been a similar situation in the past? What were the legal questions involved? What were the facts of the case? What was the decision? Was this a fair treatment of the law? Has there been any change in the decision as a result of legislation? If there have been no similar situations in the past, have there been any analogous situations? If no analogous situations have arisen, is there any legislation which may be applicable? What is the intent, meaning and scope of such legislation?

Each court case is concerned with a particular set of facts and circumstances upon which a decision is made. The fact situation is carefully analyzed and a search is made for similar situations in the past. The bases for the decisions of previous cases are analyzed. This process will discern a similar pattern or the judge may find that the view of the court has changed. A change may take place because of a change in moral, political or economic views of the community or because of legislative acts.

Each court case gives a narrow view of the law. As new cases are decided, with slightly different facts and circumstances, the view of the law is broadened. However, this broadened view of the law does <u>not</u> mean a change in

the direction of the law. For a change in the direction of the law there must be a change in the legislative act. The broadening or developing of the law involves interpreting the intent, purpose and scope of legislation. This usually involves a great length of time.

To understand the meaning of a particular section of the law, one must study successive cases which resemble each other closely. The similarities and differences between the facts and circumstances of the cases must be studied in order to understand the precedence involved.

> A court can also reason by analogy by considering the similarities between two situations, where one of the two situations is covered by a statutory provision. If the similarities between the two situations outweigh the dissimilarities, the court can say that the statutory provision applies to both situations.
>
> Sometimes, when the dissimilarities are so great that we cannot fairly say that the similarities outweigh the dissimilarities, the court will still apply the statutory provision applicable to the one situation by invoking the spirit of the law: we refer to this method as the doctrine of analogy. (Zwarensteyn, 1968, p. 74)

This paper will review the Griggs v. Duke Power Company case and the guidelines, laws and regulations pertaining to Affirmative Action and Equal Employment Opportunity, and will invoke the doctrine of analogy to relate an opinion of what this means for the use of standardized interest measures.

Related Judicial Review

Griggs v. Duke Power Co. (1971) is the most important case dealing with testing and employment procedures. The United States Supreme Court held, in Griggs, that the requirement of a high school education or a minimum score on a standardized general intelligence test is an impermissible condition to employment or transfer of jobs where neither standard is shown to be significantly related to successful job performance.

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The Court was principally concerned with three interrelated considerations:

1) Congressional objectives in passing Title VII of the Civil Rights Act of 1964;
2) Equal Employment Opportunity Commission Guidelines and interpretations; and
3) Congressional intent as to Section 703(h), specifically.

The Duke Power Company's Dan River steam station was organized into five operating departments: 1) Labor, 2) Coal Handling, 3) Operations, 4) Maintenance, and 5) Laboratory and Test. The District Court found that prior to July 2, 1965 (which was the effective date of the Civil Rights Act of 1964), the respondent "openly discriminated on the basis of race in hiring and assigning of employees" at its Dan River plant. "Negroes were traditionally engaged only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other departments." (Griggs v. Duke Power Co., supra note 1, at 427)

The Griggs case states the Supreme Court interpretation of what is required of employers under Title VII of the 1964 Civil Rights Act. Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in head-winds" for minority groups and are unrelated to measuring job capability. Tests must measure the person for the job and not "the person" in the abstract. The Griggs case determined that for a test to be valid it must be related to a particular type of job; the second requirement is that the test be "professionally developed." However, this has since been questioned. "It seems from this holding that the courts will look mainly at whether the employment test in question has an adequate business necessity. They will look to see whether the skills measured by the test are comparable to those required by the job, and whether there is a fairly high

correlation between the score a person gets and his actual performance on the job. If these things are satisfied, then it seems that whether the test was constructed by a person with professional credentials or not wouldn't make too much difference." (Northcross, 1973)

Revised Order No. 4 and Executive Order 11246, as amended, include the concept and implementations of Affirmative Action programs. Affirmative Action programs are aimed at, among other things, eliminating the existing discriminatory barriers to equal employment opportunity. Patterns of systematic discrimination have been so pervasive within the culture that there has been an enormous underutilization of human talent. Employment and promotion policies, whether based upon state protective legislation or "common practice" and stereotypic thinking, have contributed to systematic underutilization. Within the concept of Affirmative Action, once a pattern of underutilization is identified, the next steps are to assess the obstacles which have produced it, and then to design corrective measures.

Interest tests are usually administered to answer the basic question: "Should an individual consider, train for, or enter a specific occupation?" (Harmon, 1973) If an interest inventory is or can be used to encourage a person to enter or to reject an occupation, in part or in whole on the basis of sex, then the interest instrument is biased. Interest instruments are limited in the number of options they offer; frequently there is marked disparity, on the basis of sex, between the scales provided for reporting results. Additionally, they may have been normed in a sexually stereotypic manner, i.e. two test forms with different occupational scales, each based on responses from one sex.

The occupational scales available on the Kuder DD, the SVIB TW398 for women, the SVIB T399 for men, and the MVII are examples of sexual

> stereotype in the world of work. These are the best of the interest inventories, yet they tend to perpetuate the idea that sex and occupational choice are inherently related. They suggest that there are some occupations (architect, electrician, production manager, life insurance salesperson) which women should not enter and some occupations which men should not consider (elementary teaching, nursing, secretarial work). (Harmon, 1973, pp. 499-500)

In his partial dissent of the majority decision in the Griggs case, Judge Sobeloff noted the "freezing" of an entire population of Negro employees into the discriminatory patterns which existed before the Civil Rights Act. Sexually biased interest tests could have the same effect of "freezing" women into only thinking about and perhaps only being counseled toward certain job classifications and careers.

Consideration of bias or discrimination stemming from the use of interest tests employing separate (but equitable) scales, normed on populations differentiated by sex, does not appear to be within the scope, intent or spirit of existing law. The current practice of reporting scores to individuals of one sex which have been developed for the other sex is questionable counseling/employment practice and not mandated by law. From the Hobson v. Hanson, 1967, decision (re ability testing) a crucial assumption is that the individual is fairly comparable with the norming group in terms of environmental background and psychological make-up; to the extent the individual is not comparable, the test score may reflect those differences rather than innate differences.

The Griggs and the Hobson cases set the legal precedence for the use of interest and ability tests in employment practices. The Civil Rights Act, Revised Order No. 4, and Executive Order 11246, as amended, intend to eliminate all forms of discrimination against racial minorities and women. As earlier noted within this paper, a court can reason by analogy by considering the

similarities between two situations, when there is statutory provision for only one of the situations. Accordingly, the use of biased interest tests is contrary to the spirit of the law, and should be found to be illegal in a court of law.

Activities of the Professional Associations

The awareness and involvement of professional associations in expressed concern for affirmative action re interest testing--to some extent, testing in general--has been disappointing. Initiative on the part of organizations has been prompted only after concerned members focused upon the issue. In connection with the Omnibus Post-Secondary Education Act Hearings of 1970, Fitzgerald noted the discriminatory nature of a prominent interest test, based upon vastly different norming and occupational options indicated on the basis of sex. Pursuing this same point, Schlossberg and Goodman submitted a resolution to the American Personnel and Guidance Association for consideration at the annual meeting in Chicago, March 1972. The strongly worded resolution was referred to a Division of the APGA, the Association for Measurement and Evaluation in Guidance (AMEG) and the AMEG Commission on Sex Bias in Measurement. This Commission published their findings in a report of October 1973. A major outcome of this report (1973) is the recommendation for a permanent committee on sex bias in measurement "charged with contacting test publishers and offering the services of specialized teams of AMEG members to help assess sexual bias in specific instruments."

The American Psychological Association ad hoc Committee on Women in Psychology recommendations are specific regarding aptitude and personality tests with respect to possible stereotyped concepts of masculinity and feminity, but interest testing is not mentioned. (APA Monitor, Sept.-Oct. 1973) Most "inherent test

bias" concerns of the APA and other education organizations relate to racial or culture-fair testing, or exclude, perhaps by default, the cluster of interest tests when focusing upon occupational-vocational references, resources and tools.

Resolutions of other guidance, counseling and personnel associations, such as the National Association for Women Deans, Administrators and Counselors, and the National Association of Student Personnel Administrators have supported equal employment opportunities, affirmative action programs and non-sexist counseling tools, but have been non-specific regarding the development, content, and use of unequal norming and scaling practices specific to interest testing.

Several professional organizations are directly concerned with writing legislation governing the licensing of practitioners at the state level, with lobbying for federal funding for training programs for graduate professional education, and they may also establish curricular standards for post-secondary education for professional training. Among these groups are: the American College Personnel Association, the Association for Counselor Education and Supervision, and the National Vocational Guidance Association, all of which are Divisions of the American Personnel and Guidance Association; Divisions 5, 12, 15 and 17 of the American Psychological Association, which give focus to Evaluation and Measurement, Clinical, Educational and Counseling Psychology. Since these organizations, together with others, have endorsed Affirmative Action programs, they should now address themselves to the development and use of non-sexist counseling tools which would include interest inventories. In the realm of professional training programs, the Associations should require careful review and the elimination of textbooks and other resources, existing curricular emphasis and practice which delimit or otherwise discriminate against women as professionals, or perpetuate

stereotyped career opportunities for girls and women as clients or students.

State Laws Affecting Employee Selection

Topical law reports are not available for the areas of counseling or the more general topic of education; however, "testing of workers" is included in the Commerce Clearinghouse Report (Employment Practices Guide, 1973). The following states have enacted laws regulating the use of pre-employment tests by employers; the numbers preceding the state refer to the Paragraph numbers within the Commerce report: 20,495 - Arizona; 20,860 - California; 21,060 - Colorado; 22,880 - Iowa; 23,850 - Maryland; 27,250 - Pennsylvania.

An examination of the wording employed within these laws shows careful adherence to the language of the 1964 Civil Rights Act. For example, a comparison of the EEOC Uniform Guidelines on Employee Selection Procedures with the language of the State of Iowa Employee Selection Procedures shows great similarity. It is interesting to note that in rules defining a test, both employ the words "used as a basis for any employment decision"; also both include "occupational or other interests" within the definition.

Although these guidelines are specifically provided for employers, to be followed within employee selection procedures, it would seem to be within the intent and spirit of the law that "employment decision" and "occupational and other interests" must include those factors which inhibit free choice on the part of the prospective employee. Thus, a procedure or requirement utilizing an interest test with limited or biased employment/occupational scales and obtaining the test results by means of printed format with or without consultative interpretation, could be included as a part of an employment decision jointly made by the employer and employee.

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A review of the thirteen laws in eleven states which concern pre-hiring inquiries was non-productive relative to interest testing.

Although individual state laws may be comprehensive and conform to the intent of Affirmative Action legislation from the Federal level, it seems apparent that not all states will follow suit. Comprehensive Federal legislation or Supreme Court interpretation of existing legislation, directed to interest testing, is preferable to fifty state laws on this subject.

National Laws, Regulations and Guidelines

Title VII of the 1964 Civil Rights Act, as amended, states that it is an unlawful employment practice for an employer to limit, segregate, or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect their status as an employee, because of an individual's race, color, religion, sex or national origin. Prior to the 1972 amendment, and following adoption of the Civil Rights Act, the Illinois Fair Employment Practice Commission held, in Myart v. Motorola, Inc. (1964) that even though the ability test in question in this case had been professionally developed, it could not be used in employment decisions because it had not been revised to meet the needs of the culturally deprived.

The spirit of the law, as interpreted by the court, indicates that the use of any test in the employment decision process (in the broadest sense of the practice) must not in any way deny that individual equality of employment opportunity. Just as a test was ruled inappropriate for use in employment decisions becuase it had not been revised to meet the needs of the culturally deprived, inferentially it may be held that use of interest tests which limit the individual because of scaling options provided on the basis of sex, or which require

interpretation of normed scales inappropriate on the basis of sex, also inappropriate for use in employee selection.

Title IX of the Higher Education Amendments of 1972, Section 901(a) prohibits, on the basis of sex, exclusions from participating in, or denial of the benefits of, or individual subjections to discrimination under any educational program or activity receiving Federal financial assistance. " . . . as a condition of receiving Federal assistance, your institution must make all benefits and services available to students without discrimination on the basis of sex" (Pottinger, 1972), so stated a memorandum to presidents of institutions of higher education participating in Federal assistance programs. To the extent that sex stereotypic interest tests are held to be discriminatory when used in the decision-making, guidance or counseling or occupational/vocational information dissemination process of education, then use of interest tests now commonly employed in secondary and post-secondary education is illegal.

The Congress of the United States has left to the Equal Employment Opportunity Commission and to the courts the responsibility of determining what specific practices constitute race and sex discrimination. Congressional action demonstrates little effort to list or otherwise specify or determine the precise conduct which would be illegal under the 1964 Civil Rights Act and/or Title IX of the 1972 Higher Education Amendments. Thus, courts must base their judgments on the broad policies of these laws. The resultant development resembles a "common law" of unfair employment practices.

Additionally, courts are not bound by regulations issued by the EEOC (Grimm v. Westinghouse Elec. Corp., 1969), and judicial challenges to resolve issues of test validation have been complicated by the failure of many courts to demand

strict compliance with Guidelines in Title VII litigation. Public employers, initially exempt from Title VII, may also be held less stringently to the test validation standard related to challenges based upon the equal protection clause of the Fourteenth Amendment. It seems essential that courts adopt the clear format presented by the EEOC Guidelines in Employee Selection Procedures to resolve the critical issues involved in employment testing.

The OFCC Guidelines require employers using tests to have data available which demonstrates that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job for which the candidates are being evaluated. These regulations on Employee Testing and Other Selection Procedures specifically state that "Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of validity" (1971). A testing program must be found to be of significant help in predicting prospective employee performance for the job in question. Inferentially, an interest test which delimits options, does not include areas of potential employment provided by the administering organization, or which has clear sex-related but unequal options on properly normed scales, could not be administered.

Recommendations

Federal legislation of concern to this topic is broad in scope, but relatively unspecified. Interpretation of this legislation is implemented by means of Federal Guidelines, and also is developed by judicial review and decision in a court of law. Law is, therefore, evolutionary in nature, but frequently involves a great deal of time outside the judicial system for the development of guidelines. An example of lengthy time-frame requirements is the more than twenty month period

required to develop Guidelines for Title IX, Higher Education Amendments of 1972.

In the development of legislative guidelines, and more directly, in the writing of statutory laws, greater specificity in supporting statements of intent and direction for the legislation is mandatory.

The following should be helpful in developing future legislation and/or in revising guidelines affecting existing laws which impact interest measurement:

1) in those instruments which employ separate test forms, on the basis of sex, the same vocational scales, clusterings and occupational choices should be provided;

2) in those instruments which employ separate test forms, on the basis of sex and with the same scales, the norming of the scales should be on the basis of sex;

3) interest instruments utilizing a single test format should be normed on the basis of populations which are comparable to the environmental, cultural and psychological background of the test-taker;

4) the language employed within the test must not be sex-biased;

5) the use of interest inventories in employment decisions should clearly demonstrate a relationship of test scales to employment roles within the immediate work setting;

6) interest testing in employment decisions should be supported by data indicating a direct relationship between test scores and success in the positions available;

7) the use of sex-biased interest tests in the educational setting is illegal;

8) professional training programs for persons who will use interest tests should include a content unit regarding sex-bias in interest testing and interest test construction and interpretation;

9) graduate programs, workshops, conferences and participants in these and related programs sponsored by Federal funding should include training segments related to non-sexist interest testing;

10) Federal legislation should be enacted which will direct sufficient

funding to develop non-sexist interest inventories and related vocational resources/references for all educational and employment levels.

Summary

Nearly a decade after the landmark Civil Rights Act (1964) which has since engendered increasingly specific laws encompassing discrimination and bias based upon sex, no test case has included or noted interest measurement instruments. Employing the method of doctrine of analogy, inferences regarding the legal issues of interest testing in education and employment have been drawn from similar court decisions, from the non-specific Guidelines implementing laws, and from statements re test bias emanating from national professional organizations and measurement specialists.

To the extent that interest inventories support stereotypic sex and occupational linkages or restrictions, the tests are biased. Disparate scales on sex-distinct forms of a test, normative procedures which might predictably produce distinctly different scores on account of sex, and/or misuse of interest tests in educational and employment decision-making are examples of potential legal issues related to interest testing. Specifically, should a sex-biased interest instrument be instrumental in discouraging an applicant for educational or employment opportunity, or be used in a negative decision in the case of the applicant because of differentiating scales or inappropriate sex-based normative data, then it would appear that the spirit of the law was denied.

State and Federal laws enacted since the Civil Rights Act (1964) and as amended, have tended to incorporate and reflect many of the same provisions and definitions of terms re testing and occupational/educational interests. Generally these Guidelines have been non-specific regarding interest testing, and inferential opinion has not led to judicial action. Two remedies seem clearly indicated: 1) revision, with greater specificity regarding the use of interest tests and the educational/employment applicant's stake in the decision-making process, of extant

Guidelines supporting law, and greater specificity within Guidelines to be developed to support Title IX of the Education Amendments (1972); 2) the development of future laws related to discrimination and bias should definitively state the dimensions of concern in order to assure judicial decisions that more closely correspond to the spirit of the law.

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